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In The

Supreme Court of the United States

No. 73-613

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA—LOCAL NO. 540 AND RALPH D. EDGERTON,
Petitioners,

v.

GEORGE D. LUSK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW AND SET ASIDE DECISION OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW 3

STATUTES INVOLVED 3

ARGUMENT:

1. The District Court Lacks Jurisdiction. 14
2. The District Court's Transfer Card Findings Not Amply Supported By Record Or Law. 17
3. The District Court's Damage Findings Not Amply Supported By Record. 21

CONCLUSION 24

CERTIFICATE OF SERVICE 25

TABLE OF CASES

Ferger v. Iron Workers, Local 483, 238 F.Supp. 1016 (D.C. N.J., 1964), aff'd 342 F.2d 430 (CA 3, 1965) 15

Ferger v. Iron Workers, Local 483, 356 F.2d 854 (CA 3, 1966), cert. den. 384 U.S. 902 (1966) 15

Ferger v. Iron Workers, Local 483, 94 N.J. Super. 554 (N.J. Sup. Ct., Ch. Div., 1967), 55 Labor Cases Para. 51, 664, aff'd 235 A.2d 482 (N.J. Sup. Ct., App. Div., 1967) 16

Hughes v. Iron Workers, Local 11, 287 F.2d 810 (CA 3, 1961), cert. den., 368 U.S. 829 (1961) 14

International Brotherhood v. Wood, 162 Va. 517, 175 S.E. 45 (1934) 19

Parish v. Legion, 450 F.2d 821 (CA 9, 1971) 16

Page

Teamsters, Local 357 v. N.L.R.B., 365 U.S. 667 (1961) 24

United Brotherhood v. Moore, 206 Va. 6, 10-11, 141 S.E.2d 729 (1965) 19

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 16

Vessella v. U.S., 405 F.2d 599, 600 (CA 4, 1969) 17

In The

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UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA—LOCAL NO. 540 AND RALPH D. EDGERTON,
Petitioners,

v.

GEORGE D. LUSK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW AND SET ASIDE DECISION OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada—Local No. 540 and Ralph D. Edgerton, petition the Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. This petition is made with reference to the Court of Appeals' July 9, 1973 decision in *George D. Lusk* v. *United Associa-*

tion of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada—Local No. 540 and Ralph D. Edgerton, No. 73-1065, —F. 2d —(CA 4, 1973). Copy of said decision and judgment is appended hereto.

Since the said decision and judgment of the Fourth Circuit are *per curiam,* the Petitioners are requesting the clerk of the court, pursuant to paragraph 1 of Rule 21 of the Rules of the Supreme Court of the United States, to certify and provide for transmission to this Court the following parts of the record below:

1. Appendix.—This includes, among other things, the opinions and orders (including findings of fact and conclusions of law) of the District Court referenced in the Fourth Circuit's *per curiam* decision and judgment of July 9, 1973.

2. Petitioners' brief and reply brief in the court below.

3. Petitioners' Motion for Summary Reversal in the court below.

4. Petitioners' letter, by counsel, dated March 26, 1973, addressed to Mr. William K. Slate, II, Clerk, United States Court of Appeals for the Fourth Circuit.

Petitioners' *statement of the case* and *argument* herein are the same as set forth in Petitioners' brief in the court below, except that references to the appendix and its contents, exhibits, and other parts of the record below are omitted herein.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1), which provides that this Court may review cases in the courts of appeals "by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The *per curiam* decision and judgment sought to be reviewed was decided and entered on July 9, 1973, and the statutory provision believed to confer jurisdiction on this Court to review the said decision and judgment by writ of certiorari is 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW (BASED UPON FOURTH CIRCUIT'S PER CURIAM ADOPTION OF DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW)

1. Was the district court with pendent jurisdiction to (a) order transfer of Respondent's membership into Petitioner Local 540, and (b) award damages to Respondent for lost wages, injury to reputation, and humiliation and embarrassment?

2. Are the district court's findings that Respondent duly presented his transfer card to the Petitioners, in accordance with the union constitution, amply supported by the record and in law?

3. Are the district court's findings that Respondent sustained damages for lost wages, injury to reputation, and humiliation and embarrassment amply supported by the record?

STATUTES INVOLVED

This case involves a claim asserted under the "Bill of Rights" subchapter of the Labor-Management Reporting and Disclosure Act of 1959. Respondent brought his action in the U.S. District Court for the Eastern District of Virginia—Newport News Division, pursuant to Section 101 (a)(1) of that Act, 29 U.S.C. Sec. 411 (a)(1), which provides as follows:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

Respondent further brought his action in the district court pursuant to Section 3 (i) of the Act, 29 U.S.C. Sec. 402 (i), which provides as follows:

> "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

Respondent further brought his action in the district court pursuant to Section 3 (o) of the Act, 29 U.S.C. Sec. 402 (o), which provides as follows:

> "Member" or "member in good standing", when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

Respondent further brought his action pursuant to Section 102 of the Act, 29 U.S.C. Sec. 412, which provides as follows:

> Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Respondent further brought his action in the district court pursuant to 28 U.S.C. Sec. 1337, which provides as follows:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the district court below is shown under the heading "Statutes Involved," *supra.* In the district court, Respondent also asserted pendent jurisdiction in his complaint.

As will appear more fully hereinafter, review on certiorari should be granted in accordance with Rule 19 (b) of the Rules of the Supreme Court of the United States because (1) the *per curiam* decision of the Fourth Circuit is in conflict with the decisions of another court of appeals on the same matter; (2) the Fourth Circuit has decided important questions of federal law which have not been, but should be, settled by this Court; (3) the Fourth Circuit has decided a federal question in a way in conflict with an applicable de-

cision of this Court; (4) the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

STATEMENT OF CASE

Respondent brought an action pursuant to 29 U.S.C. Sec. 411 (a)(1) alleging that while a member in good standing of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (International) and of Local 272 of that international union, the Respondent, a pipefitter, was improperly denied transfer of his membership in Local 272 to the Petitioner Local 540 in Newport News, Virginia.

Respondent sought injunctive relief ordering his transfer of membership from Local 272 into Petitioner Local 540, as well as an award of damages. The district court, Honorable John A. MacKenzie presiding, ruled on February 25, 1972, that the said action was maintainable, notwithstanding the district court's observation that "prior to the filing of his complaint with this court, plaintiff was heard on essentially the same complaint before the National Labor Relations Board. The Board found against the plaintiff on the merits and gave the plaintiff the opportunity to withdraw his complaint, which the plaintiff, in fact, did".

This case was tried without a jury on September 22, 1972. A motion to dismiss as to the then defendant International was granted at the conclusion of plaintiff's evidence, and this petition is now maintained by the two remaining defendants, Ralph D. Edgerton and Local 540.

Prior to trial, the parties stipulated to the following facts which the district court adopted as part of its findings:

A. That the Respondent, George Lusk, was a member of Local 272 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

B. That the Respondent had a travel card from Local #272 which the Respondent claims was presented to Local 540 on the 24th day of November, 1969. This card was accepted by the Local #540 business agent, Petitioner Ralph D. Edgerton.

C. That thereafter the Respondent presented a transfer card to the business agent of Local 540, Ralph D. Edgerton, at which Respondent claims was the proper time and said transfer card was not accepted by said Ralph D. Edgerton.

D. That the transfer card of the Respondent was presented by him to the Petitioner Local 540 on one occasion only.

E. That damages, if any, concerning loss of employment would start November 24, 1970, and continue thereafter.

F. That on or about July 26, 1971, the Respondent, George Lusk, filed a similar complaint against the Local 540 with the National Labor Relations Board. Thereafter, the board investigated the complaint and after conferring with the Respondent the complaint was withdrawn.

G. That the Respondent's income for the last four years is as follows:

1968	$ 6,649.76
1969	7,654.30
1970	14,401.40
1971	7,414.42

H. That with the exception of thirty dollars, the Respondent's entire income for the year 1970 was derived from earnings at Stone & Webster Engineering Corporation.

The district court further found as follows:

1. That the travel card referenced in stipulation B, *supra,* had been issued properly in accordance with the International's constitution;

2. That by virtue of the said travel card and as authorized by the said constitution Respondent worked out of Local 540 after November 24, 1969, and paid dues to both his home local, Local 272, and Local 540 through March, 1971; and that Respondent's March, 1971, dues payment to Local 540 was returned to him by that local.

The record shows, however, that Respondent paid his dues to Petitioner Local 540 through January, 1971, and that his February, 1971, check for that month's dues (said check reproduced at back of Petitioners' brief in the court below) had been returned to him by Local 540 on the ground that Respondent had previously, on January 13, 1971, picked up his travel card. On the second half or reverse side of Respondent's union dues payment card with Local 540, appears the handwritten notation: "Received TC 1/12/71 Reported back Offered Catalytic job—refused by Lusk Accepted T. C." At the trial, when first asked by his counsel "What happened to your travel card?", Respondent answered "I don't know". Thereafter, upon further questioning by his counsel, Respondent denied that he ever got his travel card back.

3. That on November 24, 1970, Respondent presented his transfer card to Edgerton. *Notwithstanding Edgerton's testimony* that the transfer card was presented prematurely, in violation of the International's constitution and Edgerton's further testimony that he advised Respondent "George, it is too early, it is out of order," the district court accepted Respondent's testimony that the transfer card was presented

to Edgerton on November 24, 1970, because Respondent, *"knowledgeable as he was of the terms and conditions of the constitution, would be unlikely to make a mistake in this regard"* (italics supplied). The district court further accepted Respondent's testimony in this connection because Respondent testified that he presented his transfer card to Edgerton on the same date Respondent was fired from his job at Stone & Webster Engineering Corporation, "a fact which had been established in evidence *as being November 23 or 24, 1970*" (italics supplied).

Respondent has recognized the union constitutional requirement that his travel card must first have been on file with Local 540 for twelve months or more before his application for and presentation of his transfer card to that local union, and it was Respondent's testimony that he presented his transfer card exactly twelve months to the day. At the trial, Respondent specifically testified on direct examination that with respect to his transfer card he had complied with all the union rules and regulations. In his deposition, Respondent acknowledged that if his transfer card had been presented prematurely, by even one day, that Local 540 would not be required to accept it, and at the trial Respondent acknowledged the union constitution as governing his transfer rights. In his deposition, Respondent apparently felt that he had met the twelve-month requirement because he had paid his dues to Local 540 from November, 1969 until January, 1970, a period of fourteen months of dues payments.

On the face of the transfer card (reproduced at back of Petitioners' brief in the court below) *presented by Respondent it is provided that it must be accepted upon presentation provided that the person presenting it "has fulfilled the requirements of the constitution covering transfer cards"* (italics supplied).

4. The district court further found it to be the policy of Local 540 not to accept new members on transfer cards unless absolutely necessary, and that only three have ever been accepted out of the many applications during Edgerton's tenure as business agent of some years.

Edgerton's testimony was that he had been business agent since September, 1968 (about four years), that with respect to the number of transfers accepted he was "guessing," and that he would "hesitate to say" how many transfers had been requested, "quite a few." *With respect to these transfer requests by others, the district court itself had observed at trial that* "insofar as this suit is concerned, it does not make any difference how many other people they (Petitioners) were arbitrary with, if they were arbitrary with your client (Respondent). It is not a class action. I would doubt the relevance of it."

Edgerton further testified on cross-examination that requests for transfer are honored when the terms of the union constitution are complied with to the full extent.

5. The district court found that Respondent's transfer card was prematurely issued by Respondent's home Local 272 since Sec. 181 (d) of the union constitution provides that none shall be issued until the member requesting transfer has a valid travel card on file in the local union to which he wished to transfer (Local 540) for at least one year prior to his application therefor. The transfer card was issued by the home local (Local 272) on November 3 (1970). It should not have been issued until November 24, the district Court found.

Sections 181 (g) and (h) of the union constitution further provide a transfer card must be accepted by a local union or business agent "properly presented" and "issued in accordance with this Constitution."

6. The district court found that Local 540 received due notice of Respondent's change in domicile and residence.

7. The district court also found that the reason given to Respondent for rejection of his transfer card was that Respondent had presented it "too early." This is what Edgerton testified. At the trial, Respondent testified that when he presented his transfer card to Edgerton, Edgerton allegedly said that he, Edgerton, "wouldn't touch it with a ten-foot pole." In his deposition, Respondent testified that when he presented his transfer card to Edgerton, Edgerton allegedly threatened him. In his February 3, 1971 letter to the International, Respondent stated he was allegedly told by Edgerton that the transfer card would not be accepted unless Respondent agreed "to let the men vote me in. . . ." These represent three separate and different versions given by Respondent as to what allegedly transpired when Respondent presented his transfer card to Edgerton. At the trial, Respondent did not claim any such alleged "threat" made by Edgerton, but in his deposition admitted that he had once followed Edgerton home in his car for about ten minutes.

8-13. The district court found that as a result of not being accepted as a member of Local 540 the Respondent has suffered loss of wages, been damaged in his reputation and suffered humiliation and embarrassment. When asked by the district court how he would measure Respondent's damages, Respondent's counsel said, "To be quite honest, I don't know . . . anything I said, your Honor, *would be a guess, and would be speculation* (italics supplied). The district court responded (italics supplied), *"That doesn't leave the court much to go on. If you would be speculating, the court would be, too."* To this Respondent's counsel wholeheartedly agreed. *In oral argument before the Fourth*

Circuit, Respondent's counsel again conceded that any claim for damages was speculative. In its ninth finding of fact, the district court found no acceptable evidence of alleged "threats" against Respondent, *and at the trial, with respect to the "humiliation" allegedly suffered by Respondent, the district court concluded the Respondent's evidence to be "slim."*

In its eleventh finding, the district court found in part that as a member of Local 540, Respondent would have earned between $10,000 and $11,000 for the year 1970. *Previously in its findings the district court had adopted the stipulation of the parties that in 1970 Respondent had earned well over $14,000 while employed at Stone and Webster Engineering Corporation.* In its twelth finding of fact, the district court acknowledged *"that there is no record of the plaintiff's earnings in 1972 . . ."* (italics supplied).

In its thirteenth finding of fact, the district court acknowledged "evidence that the plaintiff has had a *poor work record and been fired from various jobs for unsatisfactory performance, namely, drinking on the job and on one occasion sleeping on the job . . ."* (italics supplied). The district court noted evidence from a "fellow worker" of Respondent's at Stone and Webster that others were guilty of drinking on the job, that the Respondent took no more time off than usual, and that Respondent's work was satisfactory. At the trial, the district court had stated, *"I don't think everybody drinking on the job is any more defense to this man's drinking on the job than if you say everybody speeds on the highway . . ."* (italics supplied).

The "fellow worker" at Stone and Webster referred to by the district court in its thirteenth finding of fact was Paul Brady. Brady testified on direct, with respect to Respondent's absenteeism, "No, I wouldn't know about that." On cross-

examination, Brady testified that he didn't know the degree or number of Respondent's absences. With respect to Respondent's work performance at Stone and Webster, Brady testified that he is not a welder, but rather a pipefitter who worked for a time with Respondent who was a welder. Respondent himself testified at trial that he was fired by Stone and Webster for absenteeism, and that he had "missed quite a bit of work over there." For this reason, Respondent had been denied unemployment compensation.

The district court concluded, on the basis of Sec. 109 of the union constitution, that the Petitioners would "likely" give preference in employment to members of Local 540. *There was no evidence presented of such discrimination. To the contrary,* Respondent himself testified at trial that Local 540 had referred him out to a substantial number of jobs over a period of years, that Respondent had worked on permit out of Local 540 for three and one-half years before Respondent had a travel card, that Local 540 had referred him to the big Stone and Webster job, as well as to other contractors. The union contract contains express provisions for exclusive non-discriminating hiring and job referrals. Employers expressly reserve the right to reject job applicants referred by the union. Edgerton testified that his duties as business agent for Local 540 are to "keep all your men employed, and they are treated equal and fair."

The district court denied punitive damages, but allowed Respondent compensatory damages in the amount of $7,500 and ordered Petitioners Edgerton and Local 540 to accept Respondent's transfer card and to accept Respondent as a member in Local 540.

ARGUMENT

1. The District Court Lacked Jurisdiction To Order Respondent's Transfer Of Membership Into Local 540, And Further Lacked Jurisdiction To Award Respondent Compensatory Damages.

As in *Hughes* v. *Iron Workers, Local 11,* 287 F. 2D 810 (CA 3, 1961), cert. den., 368 U.S. 829 (1961), this case involves a claim asserted under the "Bill of Rights" subchapter of the Labor-Management Reporting and Disclosure Act of 1959. In the case at bar, Respondent seeks to compel Petitioner Local 540 to accept his transfer of membership from Local 272, both locals being local unions of the International union. In addition, Respondent seeks to sustain an award of compensatory damages granted him by the district court.

Unlike *Hughes,* however, Respondent has not fulfilled the requirements of membership in Local 540 because, as the district court's finding number 5 states, Respondent's transfer card was prematurely issued to him by his home local, Local 272, in violation of Sec. 181 (d) of the union constitution. The court in *Hughes specifically* recognized that the "act's protection is extended to those who are in substance members, despite the fact that the officials of the particular labor organization have not performed the ministerial acts precedent to formal admission and recognition." 287 F. 2D at 815. In *Hughes,* the court specifically recognized the prerequisite that the plaintiff must have complied with all transfer of membership requirements in the constitution of the International. In the case at bar, only when this first occurs, and the *Hughes* court so recognized, does Local 540 lose its discretion to reject Respondent's membership. For these reasons, the district court lacked jurisdiction, pendent or otherwise, to grant Respondent relief.

The *Hughes* court specifically addressed itself to the relief sought by Respondent in the case at bar, i.e., a transfer of

membership from Local 272 into Local 540. Referring to Hughes as a "member" of the local union to which he sought to transfer, i.e., *arguendo,* a "member" within the meaning of the Act, the *Hughes* court concluded that he was also entitled to the specific rights (to vote in union elections, attend union meetings, etc.) specified under the Act. *But, with respect to ordering an actual transfer of membership from one local to another,* the court in *Hughes* stated "there is no warrant in the statute for granting a member of a labor organization any other membership rights secured to him by the union's constitution and by-laws which are enforceable only under state law in a suit such as that at bar." The court then concluded that Hughes would only be entitled to relief to secure his equal rights and privileges guaranteed under the Act, *not including transfer of membership from one local to another. Hughes, supra,* 287 F. 2D at 818.

Only in a footnote did the *Hughes* court observe that Hughes was not asserting any causes of action arising under state law. It is submitted that even if Hughes had so asserted, the *Hughes* court would have reached the same result because the Act was and is specific as to the rights and privileges guaranteed thereunder. This is precisely the way the district court in *Ferger* v. *Iron Workers Local 483,* 238 F. Supp. 1016 (D.C. N.J., 1964), interpreted the *Hughes* case. The district court in *Ferger* was wholeheartedly affirmed on appeal by the same Third Circuit that had decided *Hughes,* 342 F. 2D 430 (CA 3, 1965). To the same effect see *Ferger* v. *Iron Workers, Local 483,* 356 F. 2D 854 (CA 3, 1966), cert. den. 384 U.S. 902 (1966).

Thus, as is evident when the *Ferger* litigation moved into the New Jersey *state* court, the *Ferger* plaintiffs contended that while in federal court, they had sought two remedies—

a determination of their rights under the Act, *and an order directing their transfer into the defendant local's membership rolls.* The Ferger plaintiffs further pointed out that they were denied the underscored relief in federal court because of a lack of federal jurisdiction. *Ferger* v. *Iron Workers, Local 483,* 94 N.J. Super. 554 (N.J. Sup. Ct., Ch. Div., 1967), 55 Labor Cases Para. 51, 664. The New Jersey court discussed the doctrine of pendent jurisdiction, observing that such a problem does not ordinarily arise in *diversity* cases, but does arise when a plaintiff comes into federal court solely on the basis of a claim arising under federal law, such as the case at bar. The New Jersey court then concluded that the federal courts had declined to exercise pendent jurisdiction with respect to ordering transfer of membership from one local to the membership rolls of another. *Ferger, supra,* 94 N.J. Super. 554. The New Jersey state court then took jurisdiction to effect such a transfer, and was affirmed in its reasoning by the Appellate Division of the New Jersey Superior Court, 235 A. 2D 482 (1967).

So, too, in *Parish* v. *Legion,* 450 F. 2D 821 (CA 9, 1971), decided *after United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966), the Ninth Circuit, relying on the Third Circuit's decision in *Hughes, supra,* concluded that if plaintiffs who sought transfer of membership from one local union to another were entitled to relief, "it should be limited to that appropriate to secure to appellants the equal rights and privileges guaranteed by Section 101 (a) (1) and other provisions of the Labor Management Reporting and Disclosure Act," citing *Hughes, supra,* 287 F. 2D at 818.

All of the foregoing rationale with respect to the lack of pendent jurisdiction in federal courts to order transfer of membership from the membership rolls of one local union to the rolls of another, applies with even greater force to

an award of *compensatory damages,* as in the case at bar, which finds no basis whatsoever under the Act.

Further, no relief is available to Respondent under the Act because as the *Hughes* court recognized, the Act first contemplates and requires the plaintiff to fulfill the membership requirements of the International constitution. Although at trial there was a conflict of testimony as to when Respondent presented his transfer card to Edgerton, there is no dispute that Respondent's transfer card was improperly *issued* to him by his home local, in violation of the union constitution, and the district court so found in its fifth finding. Further, on the face of Respondent's transfer card Respondent was put on notice that he must first have *"fulfilled the requirements of the constitution covering transfer cards"* (italics supplied). Even if Edgerton was incorrect in believing that the transfer card had been presented by Respondent to Edgerton before Respondent's travel card had been on file with Local 540 for at least one year, there is no question, nevertheless, that Respondent's transfer card was improperly *issued* to him at the very outset.

2. The District Court's Findings that Respondent Duly Presented His Transfer Card, In Accordance With The Union Constitution, Are Incorrect, And Are Not Amply Supported By The Record Or In Law.

In *Vessella* v. *U.S.*, 405 F. 2d 599, 600 (CA 4, 1969), the court stated the standard for the findings of fact of a district court, sitting without a jury (as in the case at bar), as follows: "This finding is amply supported by the record and is binding on us under Fed. R. Civ. P. 52."

As previously discussed, the district court's fifth finding correctly states that Respondent's transfer card was issued to him prematurely in contravention of the International

constitution. Further, Respondent himself testified that the constitution governed his rights to transfer and that in this respect it was the law. Respondent also testified that he was familiar with the pertinent sections of the constitution at the material times, and it has been shown that the very face of his transfer card placed him on notice of the constitutional requirements. Indeed, the district court in part correctly concluded in its third finding that Respondent was "knowledgeable . . . of the terms and conditions of the constitution."

Yet the district court also concluded, and it is earnestly submitted incorrectly so, that the premature issuance of Respondent's transfer card by his home local, Local 272, is a mere "technicality," notwithstanding the constitutional violation. Section 181 of the constitution deals with transfer cards. If the requirements are technical, they are also clear. If the requirements are technical, they are also serious. And if the requirements are technical, they were so intended to be. Sections 181 (d) (g) and (h) leave no doubt whatsoever that the transfer card *must first* have been properly *issued*.

There is no absolute right to union membership. In *Parish* v. *Legion*, 450 F. 2D 821, 824 (CA 9, 1971), the court states, "We concluded in *Moynahan* that Congress did not intend Section 3 (o) to 'limit the previously recognized rights of unions to choose their members.' 317 F. 2D 210. This rule is also expressly recognized in *Hughes*, 287 F. 2D at 817, and impliedly in *Ferger*, 238 F. Supp. at 1023." Discretion to admit to or refuse membership is lost only when the rules pertaining thereto have been complied with. It is well settled that "a union's constitution, rules and by-laws constitute a binding contract between the union and its members and between its members, which contract the courts will enforce if it is not immoral, contrary to law or

public policy, or beyond reason." 87 C. J. S. Trade Unions, Section 11, page 772. To the same effect, see 31 Am. Jur., Labor, Sec. 33, page 415, cited in *United Brotherhood* v. *Moore*, 206 Va. 6, 10-11, 141 SE 2D 729 (1965).

In *Moore, supra*, the Virginia Supreme Court states that "inferred or implied powers must rest upon some provision of the constitution, for it embodies the association's whole plan of existence. All rights, privileges and duties of both the association and its members must be found in the constitution. We are not permitted to look elsewhere for them." The premature issuance of Respondent's transfer card was not only the responsibility of his home local, Local 272, the issuer, but was Respondent's responsibility as well. "She (Mrs. Kiser) was charged with knowledge of the limited authority of the officers and agents of the defendant. The constitution not only constitutes the contract between a member and the association but it also constitutes the contract between a member or members and other members." *United Brotherhood* v. *Moore, supra.*

Indeed, "a person applying for membership in a fraternal benefit association is charged with the duty of acquainting himself with its constitution and by-laws; and, in the absence of fraud, is conclusively presumed to know the qualifications for membership therein prescribed and the limitations thereby imposed upon the power and authority of its officers, and upon its subordinate lodges and their officers as its agents. The same rule, of course, applies to persons who have become members." *International Brotherhood, etc.* v. *Wood*, 162 Va. 517, 552, 175 SE 45 (1934). Federal cases cited hereinabove recognize that the union constitution is the determining source. If a federal court were to exercise pendent jurdisdiction, therefore, Respondent's state claims would, on their merits, have to be resolved against him.

There is a conflict in the testimony as to the date on which Respondent *presented* his transfer card to Edgerton. Respondent maintains that he presented it exactly twelve months to the day after his travel card had been on file with Local 540 for that length of time. Edgerton testified that it was presented prior thereto and was therefore "too early" and "out of order". This is what Edgerton previously had advised the National Labor Relations Board. On the other hand, Respondent gave three different stories as to what Edgerton advised him at the time his transfer card was presented; which version of Respondent's could possibly be amply supported by the record? It is submitted that only Edgerton's testimony is amply supported by the record under these circumstances.

Even if Edgerton had been incorrect in his belief that the transfer card was *presented* prematurely, nevertheless there is no dispute that it had been issued prematurely, and this the district court correctly so found. In this connection, on the basis of the authorities discussed above, Edgerton had no authority to accept the transfer card because it had been *issued* in violation of the International constitution.

Why didn't Respondent present the card again, instead of having presented it only once as was stipulated by the parties? This would have been a simple thing to do after only a short period of time. Contrary to the said stipulation of the parties, and contrary to Respondent's own testimony, in his unfair labor practice charge filed with the National Labor Relations Board Respondent represented that *"since* November 24, 1970 Local 540 . . . has refused to accept his transfer card" (italics supplied). Yet Respondent has testified and now maintains that he presented it only one time, allegedly on November 24, 1970. To the same effect, see the false allegation in paragraph 13 of Respondent's complaint. It should be noted that although the complaint was

not personally signed by Respondent, the unfair labor practice charge, which Respondent subsequently withdrew, was.

It is submitted that Respondent presented his transfer card only one time for the same reasons he picked up his travel card as discussed below, i.e., his desire to seek employment elsewhere because of the area employers' disenchantment with his poor work record, a record so found by the district court.

3. The District Court's Findings That Respondent Sustained Damages For Lost Wages, Injury To Reputation, And Humiliation And Embarrassment Are Not Amply Supported By The Record.

Respondent was referred to the Stone and Webster job by the Petitioners. He was fired by Stone and Webster for excessive absenteeism and not being dependable. By his own testimony he missed quite a bit of work at Stone and Webster. He conceded that others had been fired by Stone and Webster for drinking, although this apparently was overlooked by the district court in its thirteenth finding. He denied that Stone and Webster fired men for sleeping on the job, and was then impeached by testimony he had given in his deposition.

Yet somehow Respondent chose to blame his shortcomings on the Petitioners. His letter of February 3, 1971 to the International makes the wild assertion that Edgerton went to the Stone and Webster jobsite and had him fired. In his deposition he admitted that he drank on the job at Stone and Webster, yet in the same deposition he reasserted that it was the union, not Stone and Webster, who fired him. He maintained this position at trial. He was fired by Stone and Webster on November 24, 1970, and the parties to this lawsuit have stipulated that Respondent's damages, if any, would start from that date. It seems rather clear that the

true "reason" for Respondent's suit is his unfounded notion that he was "fired by the union." In his deposition and at trial he stated that he would produce two Stone and Webster officials, William T. Stephenson and D. H. Armstrong, to prove this. At trial, Stephenson, a timekeeper at Stone and Webster, who was called as Respondent's witness, testified on cross-examination that Respondent was fired for absenteeism and not being dependable. He denied having told Respondent the "union" had fired him or that Petitioners had exerted any pressure on Stone and Webster to do this. He indicated that the foreman, a union member, had the power to fire Respondent and apparently did so. The foreman's name was W. W. Branch. However, this was approved by the non-union supervisor, according to Stephenson. This apparently is the whole theory of Respondent's case—if discipline is imposed by a foreman who is also a union member, then it is the union's fault, not Respondent's shortcomings. In this connection, see his testimony in his deposition where he was fired by another employer, Rollin Tompkins, and similarly blamed the union.

Armstrong, also called as a witness for Respondent, was Resident Manager at Stone and Webster. On cross-examination he flatly denied ever having told Respondent (contrary to Respondent's specific assertion) that Respondent was fired by Stone and Webster because of the Petitioners. He further specifically stated that the Petitioners had exerted no pressure or influence on Stone and Webster to have Respondent fired, nor did anybody else in Local 540.

The conclusion is inescapable that Respondent's shortcomings were severe and were his own—no one else's. The district court's thirteenth finding correctly acknowledges Respondent's poor work record. *It is graphically illustrated by the testimony of former employers who testified at his trial.*

This testimony shows that plaintiff would not now be rehired by these employers. In this connection, see Edgerton's June 6, 1969 letter to Respondent also, and Edgerton's August 13, 1971 letter to the International.

The evidence shows that Respondent picked up his travel card from Petitioners on January 13, 1971. Edgerton explained how he concluded that Respondent had presented his transfer card too early, and the circumstances under which Respondent picked up his travel card thereafter, including Respondent's having failed a welding test at Anheuser-Busch. As previously discussed, Respondent had good reason to seek employment elsewhere because of his bad work record in Local 540's area. Edgerton gave additional testimony on these reasons.

The fact is, Petitioners did all in their power to help Respondent, and he obtained a substantial amount of work from Local 540 referrals over a period of years according to Respondent's own testimony.

If the district court's eleventh finding is correct, rather than purely speculative (as it is in view of Respondent's poor work record), then in 1970 Respondent benefited by *not* being a member of Local 540, because Respondent earned more at Stone and Webster (a job he was referred to on travel card status by Petitioners).

There is no record of Respondent's 1972 earnings (which was Respondent's burden to establish) as shown in the district court's twelfth finding; both the district court and Respondent's counsel conceded his damages to be speculative; and the district court observed at trial that Respondent's evidence as to his alleged "embarrassment and humiliation" was "slim."

The district court's speculation and conjecture went still farther. The district court, *without any evidence to serve as*

a basis, concluded that Edgerton was likely to prefer members of Local 540 over non-members under the exclusive hiring arrangement in the collective bargaining agreement. The evidence shows to the contrary. Respondent obtained his full share of job referrals out of Local 540, including the big Stone and Webster job. This assumption and conclusion by the district court completely runs against the grain of *Teamsters, Local 357* v. *N. L. R. B.,* 365 U.S. 667 (1961). The exclusive hiring arrangement in the case at bar contains an express non-discrimination clause. As the Supreme Court in *Teamsters, supra,* laid the law down quite clearly, "We cannot assume that a union conducts its operations in violation of law or that the parties to this contract did not intend to adhere to its express language," 365 U.S. at page 676.

CONCLUSION

The Fourth Circuit's judgment against Petitioners Edgerton and Local 540 should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jay J. Levit, attorney for the Petitioners, certify that two copies of the foregoing Petition for Writ of Certiorari have been served upon counsel for the Respondent by mailing said copies to them in the United States mails, postage prepaid, addressed to Yacobi and Wood, 809 Main Street, Newport News, Virginia 23605.

This 5th day of October, 1973.

JAY J. LEVIT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No 73-1065

George D. Lusk,

Appellee,

versus

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada—Local No. 540 and Ralph D. Edgerton,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Albert V. Bryan, Jr., District Judge.

Argued June 7, 1973. Decided 7-9-73

Before Haynsworth, Chief Judge and Butzner and Russell, Circuit Judges.

Jay J. Levit (Beecher E. Stallard on brief) for Appellants; Robert M. Yacobi (Ballard P. Wood on brief) for Appellee.

PER CURIAM:

We affirm for the reasons stated in the opinions and orders of the District Court.

Affirmed.

SUPREME COURT, U. S.

JAN 2 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

[redacted]

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada--Local No. 540 and Ralph D. Edgerton,

Petitioners,

v.

George D. Lusk,

Respondent,

RESPONSE TO WRIT OF CERTIORARI TO REVIEW AND SET ASIDE DECISION OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert M. Yacobi
Counsel for Respondent

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Newport News, VA 23605

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW..... 3

STATUTES INVOLVED..... 4

STATEMENT OF THE CASE..... 4

ARGUMENT:

1. The District Court Had Jurisdiction 14

2. The District Court's Transfer Card Findings Supported by Record And Law..... 26

3. The District Court's Damage Findings Supported by Record..... 29

DAMAGES FOR DELAY..... 32

CONCLUSION..... 33

CERTIFICATE OF SERVICE..... 34

TABLE OF CASES

Parish v. Legion, 450 F2d 821 (9th Circuit 1971)..... 5, 26

Hughes v. Iron Workers, Local 11, 287 F2d 810 (CA 3, 1961), cert. den., 368 U.S. 829 (1961).....16, 23

Ferger v. Iron Workers, Local 483, 238 F. Supp. 1016 (D.C. N.J., 1964), aff'd. 342 F2d 430 (CA 3, 1965).....18, 24

United Mine Workers v Gibbs, 383 U.S. 715 (1966)..... 20

PAGE

Hurn v. Oursler, 289 U.S. 238..... 21

Ferger v. Iron Workers, Local 483, 356 F2d 854 (CA 3, 1966), cert. den., 384 U.S. 902 (1966)..... 25

Ferger v. Iron Workers, Local 483, 94 N.J. Super 554 (N.J. Sup. Ct., CH. Div., 1967), 55 Labor Cases Para 51, 664, Aff'd. 235 A2d 482 (N.J. Sup. Ct. App. Div. 1967)..... 25

Vassella v. U.S., 405 F2d 599, 600 (CA 4, 1969)..... 26

In The

Supreme Court of the United States

No. 73-163

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada--Local No. 540 and Ralph D. Edgerton,
Petitioners,

v.

George D. Lusk,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO REVIEW AND SET ASIDE THE DECISION OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANSWER TO PETITION FOR WRIT OF CERTIORARI

Respondent, George D. Lusk, states that the Court should deny the Writ of Certiorari to review and set aside the decision of the United States Court of Appeals for the Fourth Circuit. The Respondent requests the Clerk of the Court of the Fourth Circuit, pursuant to paragraph 1 of Rule 21 of the Rules of the Supreme Court of the United States, to certify and provide for trans-

mission to the Court the following parts of the record below:

1. Respondent's brief in the Court below.

2. Respondent's response to Appellant's motion for summary reversal in the Court below.

Respondent's deposition and transcript of the trial proceedings have been reproduced in full and each is so included in the appendix transmitted to the Court as per Petitioner's request in his brief. Respondent's statement of the case and argument herein are the same as set forth in Respondent's brief in the Court below including references to the appendix and its contents.

When cited, the deposition will be designated as "D" followed by a number or numbers referring to the page or pages therein. The page numbers may be followed by line numbers, e.g., "D. 11, L.4-5." The transcript will be similarly cited as "T"; the complaint, answer, opinions and orders, and notice of appeal, appearing in the appendix, will be cited as, e.g., "App.

1-5." The case involved joint Plaintiff's and Defendant's exhibits; they will be cited respectively as "JX", followed by the exhibit number; "PX", and "DX". The parties will continue to be referred to as they were in the Court below, Respondent (Lusk) and Petitioners (Local 540 and Edgerton).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the District Court within its jurisdiction in (a) ordering the transfer of Respondent's membership into Petitioner's Local 540, and (b) awarding damages to Respondent for lost wages, injury to reputation, and humiliation and embarrassment?

2. Was the District Court's findings that Respondent duly presented his transfer card to the Petitioners, in accordance with the union constitution, not clearly erroneous in light of the evidence presented and in accordance with the law?

3. Was the District Court's findings that Respondent sustained damages for lost wages,

injury to reputation, and humiliation and embarrassment not clearly erroneous in light of the evidence presented and in accordance with the law?

STATUTES INVOLVED

The statutes involved are those as set forth in the brief of the Petitioners and the same are therefore not restated in this brief.

STATEMENT OF THE CASE

Respondent brought an action pursuant to 29 U.S.C. Section 411 (a) (1) alleging that while a member in good standing of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (international) and of Local 272 of that international union, the Respondent, a pipefitter, was discriminatorily denied transfer of his membership in Local 272 to the Petitioner Local 540 in Newport News, Virginia.

Respondent sought injunctive relief ordering his transfer of membership from Local 272 into Petitioner Local 540, as well as an

award of damages (App. 1-5). The District Court, Honorable John A. Mackenzie presiding, ruled on February 25, 1972, that the said action was maintainable. The National Labor Relations Board had earlier quite properly concluded that the action complained of by the Respondent did not constitute an unfair labor practice under Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. Section 157-58, thus relegating the Respondent to the right of action provided in Federal District Court by the LMRDA, 29 U.S.C. Section 412. As was pointed out in Parish v. Legion, 450 F.2d 821, 829 (9th Cir. 1971):

> The General Counsel (of the NLRB) was correct in his conclusion that refusal to admit travelers into membership could not constitute an unfair labor practice under Section 8(b) (1) (A) of the National Labor Relations Act, . . . , (but) the opinion (of the NLRB) expressly recognized also that resort to the

courts under Title I of the LMRDA might be justified "in an attempt to rectify the alleged abuses by (the) local . . . ."

This case was tried without a jury on September 22, 1972. A motion to dismiss as to the then Defendant International was granted at the conclusion of Respondent's evidence (App. 12) and this appeal is now maintained by the remaining Petitioners, Edgerton and Local 540.

Prior to trial, the parties stipulated to the following facts which the District Court adopted as part of its findings (App. 12-13):

A. That the Respondent, George Lusk, was a member of Local 272 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

B. That the Respondent had a travel card from Local 272 which the Respondent claims was presented to Local 540 on the 24th day of November, 1969. This card was accepted by the Local 540 business agent, Ralph D. Edgerton.

C. That thereafter the Respondent presented a transfer card to the business agent of Local 540, Ralph D. Edgerton, at which Respondent claims was the proper time and said transfer card was not accepted by said Ralph D. Edgerton.

D. That the transfer card of the Respondent was presented by him to the Petitioner Local 540 on one occasion only.

E. That damages, if any, concerning loss of employment would start November 24, 1970, and continue thereafter.

F. That on or about July 26, 1971, the Respondent, George Lusk, filed a similar complaint against the Petitioner Local 540 with the National Labor Relations Board. Thereafter, the board investigated the complaint and after conferring with the Respondent the complaint was withdrawn.

G. That the Respondent's income for the last four years is as follows:

1968	$ 6,649.76
1969	7.654.30
1970	14,401.40

1971 $ 7,414.42

H. That with the exception of thirty dollars, the Respondent's entire income for the year 1970 was derived from earnings at Stone & Webster Engineering Corporation.

The district court further found as follows:

1. That the travel card referenced in stipulation B, supra, had been issued properly in accordance with the International's constitution. (App. 13).

2. That by virtue of the said travel card and as authorized by the said constitution Respondent worked out of Local 540 after November 24, 1969, and paid dues to both his home local, Local 272, and Local 540 through March, 1971; and that Respondent's March, 1971, dues payment to Local 540 was returned to him by that local. (App. 14).

Respondent concedes that the District Court may have erred in its findings concerning the month when Plaintiff's last check was returned

to him, but submits that this was harmless error in view of the ultimate issues in this case.

3. That on November 24, 1970, Respondent presented his transfer card to Petitioner Edgerton. This finding is amply supported by credible testimony of Respondent, George D. Lusk, that he knew and understood the requirements of the union constitution (JX 1, §§ 180, 181 (d)) governing the one year waiting period for transfer cards (T. 15-16, 22); that he had complied with these requirements (T. 16); and that he remembered he tendered the transfer card on November 24, 1970, because that action in part led to the loss of his job that same day at Stone & Webster Engineering Corporation. (T. 24-25).

4. The court further found it to be the policy of defendant Local 540 not to accept new members on transfer cards unless absolutely necessary (a practice in itself a violation of the union constitution (JX 1, § 181 (n)), which would subject the union local to a $100 a day fine) and further, that only three new members

have ever been accepted on transfer cards out of the many applications during Edgerton's tenure as business agent of some years.

Although the court had, early in the trial, questioned the relevance of the Petitioner local's general pattern of transfer card discrimination as it applied to Respondent Lusk's own case (T. 62, L. 10-14), the record makes it clear the court later recognized that the general discriminatory pattern of the local tended in logic to prove a material fact of Respondent's case, i.e., that the local, pursuant to this illegal and arbitrary policy, improperly refused to accept Respondent's transfer card. (T. 126-27, 135; L. 16-17, 136, 139-40).

5. The district court found that Respondent's transfer card was prematurely issued by Respondent's home Local 272 since § 181(d) of the union constitution (JX 1) provides that none shall be issued until the member requesting transfer has a valid travel card on file in the local union to which he wished to transfer (Local 540) for at

least one year prior to his application therefor. The transfer was issued by the home local, Local 272, on November 3, 1970. Arguably it should not have been issued until November 24, although the constitution states that the card shall be valid for a period of one month. (JX 1, § 181(f)).

Petitioner Edgerton testified that he did not refuse to accept the card because of its improper issuance, but because it was presented prematurely. (T. 113, 138-39). The court saw through the Petitioners' insistence on formality, stating, "wasn't the . . . reason (given by Mr. Edgerton), being one day early out of the year, indicative of the attitude with which these sort of transfer applications are accepted?"

"Here is a man being denied his transfer card because he is one day early. He is not told to bring it back a day later. He is just told, 'You're early,' and that's it, and when he persists in it, additional reasons are found: the card was prematurely issued; the officer didn't co-sign his letter of change of domicile; he is

a poor worker."

"It destroys the weight, it seems to me, to be given these ostensible reasons for denying acceptance of his transfer card." (T. 139-40) (emphasis added).

6. The district court found that Petitioner Local 540 received due notice of Respondent's change in domicile and residence. (App. 15).

7. The court found that the reason given to Respondent for rejection of his transfer card was that Respondent had presented it "too early." (App. 15).

8-13. The District Court found that as a result of not being accepted as a member of Petitioner Local 540, the Respondent has suffered loss of wages, been damages in his reputation and suffered humiliation and embarrassment. (App. 16). The court and the counsel for Respondent recognized that, by the nature of the harm suffered, measuring the loss for damage to the reputation and for suffering humiliation and

embarrassment will to a certain extent always be speculative. (T. 133). Thus it traditionally has been the province of the jury, or the judge sitting without a jury, to act as the surrogate of the "average reasonable man" in attempting to put a dollar value on losses incurred due to pain and suffering, defamation, or, as in this case, injuries to reputation and pride.

In its eleventh finding (App. 16), the court found in part that as a member of Local 540, the average journeyman would have earned between $10,000 and $11,000 for the years 1970, 1971 and 1972. The Respondent made far more in 1970 than the average journeyman, Petitioner Edgerton testified, because he worked on the Stone & Webster job, "an exceptional job, a once-in-a-lifetime deal." (T. 109, L. 13-19). Although the court acknowledged that "there is no record of the Respondent's earnings in 1972 . . ." (App. 16), the court recognized that Respondent's wages in 1972 "ranged from $165.00 per week as a cook to $4.02 and $4.25 an hour as a pipefitter"

(id.), which was a substantial drop from the $6.85 an hour plus doubletime for overtime that Respondent would have earned as a union pipefitter. (T. 17-18).

In its thirteenth finding of fact, the court considered the evidence of Respondent's unsatisfactory work performance to reduce the award of damages from that which the court might otherwise have awarded the Respondent for loss of income had he been an exemplary workman. (App. 16-17).

The district court concluded that Respondent's working "on permit" is not the equivalent of working as a full member. (App. 17). In addition to Respondent's requirement of paying dues to both his home local and the Defendant local, the Respondent is denied an effective voice in the conduct of affairs in Local 540, which affairs have an important effect on his means of livelihood. Further, the court concluded that Petitioners would likely give preference in employment to members of Local 540

(App. 17) although this is prohibited by the union constitution and the local contract. Although Petitioners vigorously denied such discrimination, they offered no reason why they would wish to exclude transfers from membership in their local, which can only indicate there must be some benefit to be gained from being a member that is denied to travel card workers. Further, Respondent stated in his deposition that he was given less desirable work out of Local 540 when he was working "on permit" than the members were given. (D. 104).

The district court denied punitive damages, but allowed Respondent compensatory damages in the amount of $7,500 and ordered Petitioners Edgerton and Local 540 to accept Respondent's transfer card and to accept Respondent as a member in Petitioner Local 540. (App. 17). It is this order that is now the subject of appeal by the said Petitioners.

ARGUMENT

I. The District Court Had Juris-

diction to Order Respondent's Transfer of Membership Into Defendant Local 540, and to Award Respondent Compensatory Damages.

A. Jurisdiction of the District Court Under Hughes v. Iron Workers, Local 11.

Petitioners are correct in asserting that this case is analogous to Hughes v. Iron Workers, Local 11, 287 F.2d 810 (3d Cir.), cert. denied, 368 U.S. 829 (1961), in that both cases involved a claim under the "Bill of Rights" subchapter of the Labor Management Reporting and Disclosure Act of 1959. 29 U.S.C. § 411-412.

In Hughes, the third circuit ruled that a union member has a valid cause of action in federal district court to enforce his transfer rights under his union's constitution. Petitioners maintain that the Hughes court required a plaintiff to have complied fully with the transfer requirements of the union before an action would lie under §§ 411 and 412. Thus, Petitioners erroneously, it is submitted, attempt to distinguish Hughes and its progeny, all of which hold

that plaintiffs seeking transfer of membership have a valid cause of action under the LMRDA, on the ground that Respondent in the instant case has not complied with all the technicalities for transfer.

The congressional policy expressed in the LMRDA states:

> The Congress finds . . . that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations . . . and their officials adhere to the highest standards of ethical conduct in administering the affairs of their organizations.
>
> . . .

29 U.S.C. § 401(a) (emphasis added).

The district court, with good reason, found in this case that the Petitioners Edgerton and Local 540 did not adhere to these high standards, but rather practiced a policy of discrimination in accepting transfer applications in contravention of their own union constitution. The premature issue of the transfer card and the alleged early tender were properly found by the

court to be hypertechnicalities through which the Petitioners pursued their discriminatory policies.

In Ferger v. Iron Workers, Local 483, 238 F. Supp. 1016 (D. N.J. 1964), aff'd, 342 F.2d 430 (3d Cir. 1965), the defendant union also sought to justify its refusal to accept the plaintiffs' transfer applications on the grounds that the plaintiffs had not tendered their books on entering the defendant local's jurisdiction. The court found this argument of no avail, because "any requirement of immediate tender was never pointed out to the plaintiffs." 238 F. Supp. at 1022. Furthermore, such requirements could be waived. Here the home local issued the Respondent his transfer card prematurely, without pointing out its prematureness, and Edgerton failed to notice or point out this fault to Respondent.

Thus, although as Petitioners assert so vigorously, the one-year requirement in § 181 (d) is a technicality which is on the books, Petitioners cannot clutch at this legalistic straw to justify action taken pursuant to their continuing

discriminatory policy toward transfers. Further, the union constitution itself prescribed the procedure to be followed in a case where there is a question about the validity of a card:

> (h) The Local Union shall accept the transfer card properly presented for deposit. . . .
> (i) Within thirty days after the transfer card has been deposited, if a question arises as to the legality or validity of accepting the transfer card or the issuance of the transfer card, the Local Union accepting or issuing the transfer card shall file a protest with the General President who shall take appropriate action. . . .

(JX 1, § 181(h-i) (emphasis added).

Here the Petitioner refused the card to begin with, and only later sought to justify its action on the grounds that the card was not properly issued. As the constitution indicates, supra, the proper procedure in such cases would be a post hoc protest, after the Respondent's card was accepted.

Thus, while Hughes required the Respondent to have complied with all the requirements of membership in the Petitioner local in order to

give the district court jurisdiction under the LMRDA, Ferger recognized that some requirements are mere technicalities that may be waived if they are not brought to the Respondent's attention. Further, it is submitted that even if the requirements are of substance, the Petitioners should not be permitted to hide their discriminatory practices behind a smokescreen of "ostensible reasons" for denial of transfer.

B. Jurisdiction to Order Respondent's Transfer of Membership.

Petitioners cite a number of cases for the proposition that a federal court in an action under § 411(a) of the LMRDA lacks authority to order the transfer of Respondent's membership into the Petitioner local. However, all of the cases cited but one have a distinguishing feature in common: they were decided prior to the Supreme Court's ruling in United Mine Workers v. Gibbs, 383 U.S. 822 (1966). While Gibbs did not involve a transfer dispute, the Court did speak at length on the concept of pendent jurisdiction

of federal courts to hear state claims that were involved in federal labor cases.

> With the adoption of the Federal Rules of Civil Procedure and the unified form of action . . . the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged. Yet, because the Hurn (v. Oursler, 289 U.S. 238) question involves issues of jurisdiction as well as convenience, there has been some tendency to limit its application to cases in which the state and federal claims are, as in Hurn, "little more than the equivalent of different epithets to characterize the same group of circumstances." This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial power, exists

whenever there is a claim "arising under (the) Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . " U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case". The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. (Citations omitted). The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming

substantiality of the federal issues, there is power in federal courts to hear the whole. That power need not be exercised in every case in which it is found to exist. It has been consistently recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's (or defendant's) right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants. . . Needless decisions of state law should be avoided both as a matter of comity and to promote justice . . . .

383 U.S. at 724-26. (emphasis added).

Hughes v. Iron Workers, Local 11, 287 F. 2d 810 (3d Cir.), cert. denied, 368 U.S. 829 (1961), decided five years prior to Gibbs, decided that the district court could not order the transfer of Respondent into the Petitioner local, on the ground that "there is no warrant in the

statute for granting a member of a labor organization any other membership rights secured to him by the union's constitution and by-laws which are enforceable only under state law in a suit such as that at bar." 287 F.2d at 818 (emphasis added). But Petitioners in their brief failed to note for the court the Hughes court's caveat in footnote 6 of this same page, that "Hughes has not asserted pendent jurisdiction of any causes of action arising under state law."

Similarly, Ferger v. Iron Workers, Local 483, 238 F. Supp. 1016 (D. N.J. 1964), aff'd, 342 F.2d 430 (3d Cir. 1965), did not raise the issue of pendent jurisdiction. In contrast, the Respondent in the present case specifically invoked the district court's pendent jurisdiction under Gibbs to adjudicate the question of Respondent's remedies under state law.

Further, contrary to Petitioners' characterization of the third circuit as "wholeheartedly affirming" the Hughes line of reasoning on this limited right of relief, that court in its

second review of Ferger, 356 F.2d 854 (3d Cir. 1966), was extremely reluctant to force the plaintiffs to go to the state court to seek relief, suggesting instead that the plaintiffs file a petition in the district court for clarification "of the Act in this circuit as it pertains to plaintiffs' predicament. . . . The object, of course, would be eventually to have this court pass directly upon the merits of this precise question and so resolve the present, confused, uncertain situation regarding it." 356 F.2d at 855 (emphasis added).

After a denial of certiorari in the Supreme Court, 384 U.S. 908 (1966), however, the plaintiffs repaired to the state court to seek their remedies of a transfer order. The New Jersey Superior Court specifically noted that the decision in Gibbs, marking an expansion in the area of pendent jurisdiction, "was handed down after the decisions in Ferger v. Local 483 in the Federal Courts." Ferger v. Local 483, 94 N.J. Super. 554, 229 A.2d 532, 540 (Chancery

Div.), aff'd, 235 A.2d 482 (N.J.Super. Ct., App. Div. 1962).

The state court concluded that the federal court under Gibbs could have exercised pendent jurisdiction, but in its discretion declined to do so. In the present case, the district court did choose to so exercise its discretion, and decided the state remedies issue in favor of plaintiff.

Again, in Parish v. Legion, 450 F.2d 821 (9th Cir. 1971), the only transfer case decided after Gibbs, the ninth circuit did not approach the issue of whether the district court could decide a state remedies issue under its pendent jurisdiction. Instead, the court merely affirmed the Hughes characterization of the state-federal nature of the remedies available.

II. The District Court's Findings That Respondent Duly Presented His Transfer Card to the Petitioners in Accordance with the Union Constitution, Is Correct and Supported by the Record and the Law.

This court in Vesella v. United States,

405 F.2d 599 (4th Cir. 1969), affirmed its adherence to the standards on Rule 52 of the Federal Rules of Civil Procedure which states in part:

> In all actions tried upon the facts without a jury . . . [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

(Emphasis added).

The Petitioners again stress here the "failure" of Respondent to comply with the technical requirements of the union constitution, to invalidate the court's findings, in that Respondent presented a transfer card issued prematurely by the home local. (Defendant's Brief at 15-17). They go on to cite Parish v. Legion, supra, for the proposition that "Congress did not intend Section 3(0) [of the LMRDA] to 'limit the previously recognized rights of unions to choose their members.'" The Parish court had, however, earlier distinguished transfer cases from the coverage of this dicta, on

the grounds that these men were already members of the union and thus their transfer, as opposed to their initial admission to a union, was not a matter of discretion. 450 F.2d at 824.

The Petitioners also argue that the technical requirement of the union constitution was binding on Respondent as a part of his contract with the union. But as was pointed out, supra, Parish recognized that these technical requirements can be waived by failure to notify Respondent of them.

In short, the district court could and did conclude that the Petitioners were using the technical shortcoming of the prematurely issued card as an excuse for their discriminatory practices. Thus, the court concluded that Respondent had complied with the constitution, to the best knowledge of the Petitioners, at the time he tendered his card, and was still denied his transfer rights by the Petitioners. The court, it is submitted, recognized that Respondent's technical shortcoming was far outweighed by the

Petitioners' prior course of discriminatory conduct, and ruled accordingly. The court's determination, then, that Respondent is entitled to equal treatment as a "member," should not be overturned as "clearly erroneous."

The conflicting testimony as to the date of Respondent's tender of his transfer card was resolved by the judge, after viewing the demeanor of the witnesses on both sides, in favor of the Respondent, and is not "clearly erroneous" in light of the record.

III. The District Court's Findings That Respondent Sustained Damages for Lost Wages, Injury to Reputation and Humiliation and Embarrassment Are Amply Supported by the Record.

There is ample evidence in the record to indicate that Respondent was "blacklisted" by the union local after he threatened legal action to enforce his transfer rights. He stated in his deposition (D.78-79, 112-119) that he had sought to work out of Local 540 and other Virginia locals, and had been denied referrals. He further testified that he worked for the Riggins

Company for nearly a year after his altercation with Petitioners, but was not allowed to weld pipe because that was a union job. (D. 112). Respondent also testified that he was at time of trial employed by Horne Brothers, a non-union company, in a welding capacity. (T. 8). The last two facts indicate clearly that Respondent does not have such a bad reputation in the Tidewater area that he cannot get work as a welder; on the contrary, it bolsters Respondent's contention that Petitioner Edgerton and the union have the power to discriminate in job referrals, and exercised this power in Respondent's case. While it is true that Local 540 did find Respondent several jobs through referrals on his travel card, it is only after he "pushed the issue" of his transfer rights that the local experienced its "difficulties" in referring Respondent.

The district court, then, was amply supported by the record in its finding that Respondent was denied equal treatment after he demanded his transfer rights in 1970, which

resulted in his being denied work at a time when, as Mr. Riggins testified, "I needed welders." (T. 97).

The Respondent did not present any evidence of his total income for 1972, but the court could clearly discern that Respondent had suffered a $2+ per hour drop in salary because of his union difficulties, which, over the course of a 52-week work-year would amount to some $4,000 a year loss in salary to Respondent. There was sufficient evidence that Respondent's 1971 income was almost $7,000 below his 1970 union wages income and $3,000-$4,000 below the average $10-11,000 income for a union journeyman.

It is submitted that these figures, along with whatever admittedly speculative damages the district court may have attributed to Respondent's embarrassment, etc. are certainly a sufficient factual basis for the court to have grounded its award of damages in this case.

DAMAGES FOR DELAY

The Respondent herein requests this Court to invoke Rule 38 of the Rules of Appellate Procedure which reads as follows:

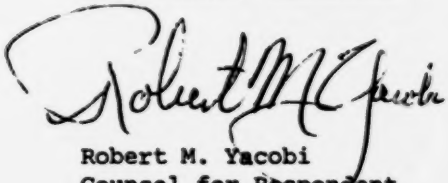
> "If a Court of Appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

It is herewith submitted that the appeal in this case is frivolous; that Petitioner's failure to admit Respondent into Petitioner Local 540 pending this appeal has caused the Plaintiff to sustain a reputable harm, and therefore, your Petitioner prays that this Honorable Court award him additional damages to compensate therefore.

CONCLUSION

The Fourth Circuit's judgment against Petitioners Edgerton and Local 540 should be affirmed.

Respectfully submitted



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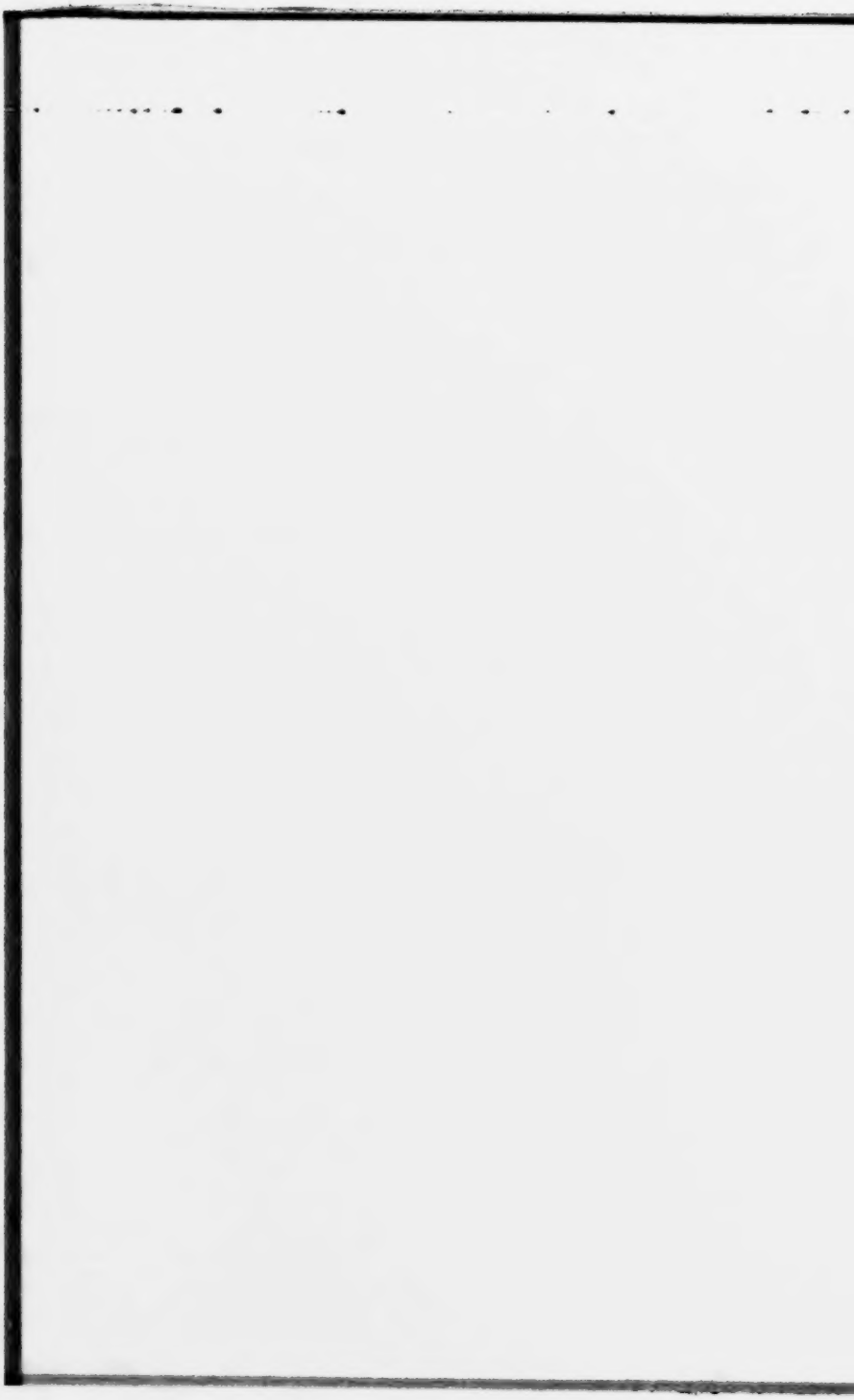

CERTIFICATE OF SERVICE

I, Robert M. Yacobi, attorney for the Respondent, certify that two copies of the foregoing Answer to Pétition For Writ Of Certiorari have been served upon counsel for the Petitioners by mailing said copies to them in the United States mails, postage prepaid, addressed to Beecher E. Stallard and Jay J. Levit, 1223-29 Central National Bank Building, Richmond, Virginia 23219.

This 28th day of December, 1973.

Robert M. Yacobi

SUPREME COURT, U.S.

FILED

JAN 8 1974

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

No. 73-613

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA—LOCAL NO. 540 AND RALPH D. EDGERTON,

Petitioners,

v.

GEORGE D. LUSK,

Respondent.

PETITIONERS' REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

BEECHER E. STALLARD
JAY J. LEVIT

Counsel for Petitioners

1223-29 Central National Bank Bldg.
Richmond, Virginia 23219

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The petition should be granted because:

1. The *per curiam* decision of the Fourth Circuit, affirming the District Court, and awarding damages to and ordering the transfer of Lusk's union membership into Local Union No. 540, is in direct conflict with decisions of the Third and Ninth Circuits. *Cf. Hughes* v. *Iron Workers, Local 11 and Parish* v. *Legion,* cited in the petition. The Ninth Circuit's decision in *Parish* relies on *Hughes,* and *Parish* was decided *after United Mine Workers* v. *Gibbs,*

the latter case upon which respondent relies. In *Gibbs*, unlike the *Hughes* and *Parish* cases, and the case at bar, the Labor-Management Reporting and Disclosure Act of 1959 was *not* involved. Respondent relies on *Gibbs* for pendent jurisdiction, but *Parish*, decided *after Gibbs*, was not influenced by *Gibbs*.

2. The Fourth Circuit has decided a federal question in a way in conflict with an applicable decision of this Court. The District Court expressly and specifically concluded in its findings that the Union would "likely" give preference in employment to those other than Lusk. Lusk presented no evidence to this effect. Thus, such an assumption adopted by the Fourth Circuit, is in direct conflict with this Court's prior decision in *Teamsters Local 357* v. *N.L.R.B.*, 365 U.S. 667, 676 (1961), cited at page 24 of the petition.

3. The District Court found that Lusk had been disciplined on various jobs for drinking and sleeping on the job. Respondent seeks to justify an award of damages for the resulting "embarrassment" to Lusk. Respondent specifically stated on the record to the District Court, and to the Fourth Circuit during oral argument, and to this Court in its response (at page 31), that damages are "admittedly speculative." Further, the District Court specifically stated on the record that if respondent were speculating, the District Court would be too.

4. The District Court specifically found that Lusk was knowledgeable of the Union Constitution, and that he had not complied with it with respect to the disputed Union membership. Yet this was brushed aside by the District Court notwithstanding the cited authorities in the petition to the contrary.

5. On the face of the record the District Court's findings simply are not supportable by the evidence. For example, the record shows that the National Labor Relations Board initially took jurisdiction of Lusk's claim, investigated it, and thereafter Lusk withdrew his charges.

Respectfully submitted,

BEECHER E. STALLARD
JAY J. LEVIT

Counsel for Petitioners

1223-29 Central National Bank Bldg.
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Jay J. Levit, attorney for the Petitioners, certify that two copies of the foregoing Reply have been served upon counsel for the Respondent by mailing said copies to them in the United States mails, postage prepaid, addressed to Yacobi and Wood, 809 Main Street, Newport News, Virginia 23605.

This 7th day of January, 1974.

JAY J. LEVIT